Supreme Court, U.S.
FILED
05-931 NOV 18 2005
OFFICE OF THE CLERK

No.

IN THE
Supreme Court of the United States

GUSSIE MINUS,

Petitioner,

VS.

DAK AMERICAS LLC,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

GUSSIE MINUS
P. O. BOX 41813
NORTH CHARLESTON, SC 29423
(843) 552-9718
Pro Se

Questions:

Question that Plaintiff brings before the Court, that the pre-trial violations did indeed occur. These pre-trial violations prevent the plaintiff from fairly presenting his case in the lower court, that the pre-trial violation were committed by both the lower court and the defendant DAK Americas LLC. The Equal Employment Opportunity Commission and the South Carolina Human Affairs Commission after investigation gave the plaintiff the "Right to Sue", this right to sue gave the plaintiff the privilege to sue for pain, suffering, damages as related to wrongful termination, violations of both local and federal work practices, under Title VII of the Civil Rights Act of 1964 (Title VII) a fair and speedy trial. The Civil Rights Act of 1964 prohibits employment discrimination based on race, color, religion, sex, age or national origin and the defendant and the lower Court failed to provide the plaintiff with documents as requested during the discovery phase of the trial which caused harm to the plaintiff's case, when the plaintiff failed to receive information pertinent to the case.

In addition the Plaintiff's case was damaged due to the defendant's failure to produce or identify all parent corporations, including grandparents, great grandparents corporation and affiliations or other entities with a direct financial interest in the litigation. Plaintiff did petition for additional parties to be added to the litigation which would have been base on the information obtained during pre-trial discovery. The Civil Rights Act of 1991 provides for monetary damages in cases of intentional employment discrimination by defendants.

The plaintiff's case was damaged when the defendant refused to provide all documents requested by the plaintiff in

relation to the sell and purchase of the Cooper River Site which transferred ownership of the Company to DAK America's LLC which would have included employment records etc, which would have shown a continuance of employment practices (i.e. harassment, intimidation, discrimination based on sex, age and race) which violated both the local, state and federal employment practices, by the parent, grand parents, and great-grandparents corporations.

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- Title VII of the Civil Rights Act of 1964 (Title VII), which prohibits employment discrimination based on race, color, religion, sex, or national origin;
- the Age Discrimination in Employment Act of 1967 (AREA), which protects individuals who are 40 years of age or older;
- the Civil Rights Act of 1991, which provides monetary damages in cases of intentional employment discrimination

OPINIONS BELOW

[X] For cases from federal courts:

The date on which the United States Court of Appeals decide case was August 23, 2005 appears at Appendix 2a to the petition and is:

[ ] reported at _____; or,

[ ] has been designated for publication but is not yet reported; or,

[X] is unpublished.

The opinion of the United States District court appears at Appendix 2a to this petition and is:

[ ] reported at _____; or,

[ ] has been designated for publication but is not yet reported; or,

[X] is unpublished.

[X] For cases from state courts:

The date on which the United States District Court of Charleston, SC decided case was adopted the report of of Judge Duffy dated March 14, 2005 appears at Appendix 5a to the petition and is:

The date on which the United States District Court of Charleston, SC decided case was December 28, 2004 is:

[ ] reported at _____; or,

[ ] has been designated for publication but is not yet reported; or,

[X] is unpublished.

FACTS

The petitioner would elaborate as to certain facts concerning the case:

1. The defendant committed pre-trial violations when they failed to disclose the corporate affiliations and other entities with a direct financial interest in litigation.

2. The defendant was in violation and did commit an error when they failed to release copies of the defendant's financial records, reports, tax records and A4 paperwork in purchase of the Cooper River Site from E.I. Dupont to DAK Americas, LLC.

3. The defendant DAK Americas LLC failed to produce or identify all parent corporations, including grandparents, and great grand parents corporations as requested by the plaintiff.

4. The defendant DAK Americas violated local Rule 4003.7 in relation to punitive damages that a party may obtain information concerning the wealth of a defendant in a claim for punitive damages as the time of discovery or during the scope of discovery.

5. The defendant committed pre-trial violations while the case was in the District Court of Charleston, S. C. pertaining to rules as indicated below:

   A. **Rule 4005** Written interrogatories to a party.

   B. **Rule 4006** Answer to Written Interrogatories by a party where as Plaintiff Move the Court to dismiss an objection and direct that the interrogatory be answered and given to the Plaintiff.

   C. **Rule 4003.5** Discovery of expert testimony, Trial Preparation Material.

   D. **Rule 4002.1** Filing Discovery Material

E. **Rule 4002** Agreement Regarding Discovery or Procedures

F. **Rule 4003.1/4003.3** Discovery

H. **Rule 4009.22** Service of Subpoena

I. **Rule 4009.1** Production of Documents and Things General Provisions

J. **Rule 4009.12** Answer to Requests Upon a Party for Production of Documents and Things

K. **Rule 4009.21** Subpoena Upon a Person not a Party for Production of Documents and things

L. **Rule 4009.26** Subpoena to Produce Documents or Things.

M. **Rule 4009.11** Request upon a party for production of Documents and things

6. Plaintiff was terminated on July 15, 2002. Plaintiff's witness was Senator Robert Ford and on the Judicial Merit Selection Commission, had informed the plaintiff not to sign the form because the "At Will Clause or Statement" was incorrect and illegal because the Bill had previously been defeated in the South Carolina Legislature. In addition, the State Senate President Pro Tem, Senator Glenn McConnell voted with Senator Robert Ford to defeat the Bill and stated that the Bill was not right for South Carolina.

7. The plaintiff did notify the South Carolina Human Affairs Commission and the South Carolina Equal Employment Opportunity Commission that Ms. Patricia Fuller (witness) about the form and how the "At Will Clause or Statement" was illegal. The commission gave the plaintiff the "Notice of the Right to Sue" for wrongful termination on December 18, 2003.

PRE-TRIAL VIOLATIONS

The petitioner would also elaborate as certain facts concerning the case. The defendant DAK Americas, LLC counsel subpoenaed the plaintiff's employer at the time and former employers for documents concerning his employment on September 29, 2004.

Plaintiff also requested information and DAK Americas', LLC counsel did not direct that defendant provide plaintiff with copies of all information taken or received from MAU, Inc. a.k.a. Robert - Bosch Corporation, and the SC Employment Security Commission and Columbia Staffing Inc.

Plaintiff petitioned the District Court for to require the defendant to provide the plaintiff with copies of the documents obtained via subpoena in relation to the above mentioned case. Plaintiff would elaborate that the court failed to grant the subpoenas requested by the plaintiff and again failed to require the defendant to provide the plaintiff copies of information obtained from their subpoenas.

Pre-trial violations did occur when Judge Carr transferred the case to Judge Norton. The plaintiff was not notified prior to this transfer. When the plaintiff discovered what had happened, he motioned the court for information as to why the case was transferred just prior to the case being send before the court. Plaintiff again motioned the court for Judge Carr's papers and other pertinent documents etc in relation to the case. The court committed and error by not returning documents, papers etc when the case was transferred. The court failed the plaintiff when he petitioned the court not to transfer the case to Judge Norton, but Judge Carr did it not noting the plaintiff's objections.

Plaintiff will also elaborate that after the case had been transferred to Judge Norton and the plaintiff did appeal to the United States Court of Appeals in Richmond Virginia for

assistance. Judge Carr made a recommendation for the defendant DAK Americas, LLC.

The plaintiff objected to Judge Carr's recommendation for the defendant to moot all of the plaintiff's motions. The District's Court was in error when Judge Carr's recommendation to moot all of the plaintiff's motions because the court appointed advisor Catrina Murry stated, that Judge Norton would make the final decision or recommendation and not Judge Carr in the case since the case had been transferred from Judge Carr.

ARGUMENTS

The petitioner opted to appeal the case due to pre-trial violations by caused by the defendant's counsel due to pretrial violation by defendant DAK Americas, LLC and Judge Carr in the District Court of Charleston, SC and the defendant DAK Americas LLC counsel such as failure to produce documents. Plaintiff's case was hurt and damaged by these pre-trial violations and errors.

The court failed to respond to plaintiff's full retirement, back pay and benefits and plaintiff is a retiree from the DAK Americas LLC and should receive the financial statement and report. The defendant's counsel requested the plaintiff's tax records for three years and plaintiff's responded within a reasonable time. Plaintiff requested the defendant's tax record, and all financial information that may have or could be reasonably expected to impact this case.

The defendant refused to comply with the plaintiff's requests during the discovery phase of the case even after the plaintiff filed a third motion to compel the defendant to comply. In addition in the district court of the United States District of South Carolina Charleston Division.

As reference in the court's transcript of the motion hearing before Judge Robert Carr on June 25, 2004 on page five. Judge Carr asked the defendant's counsel a question:

Court: I thought you told me (Judge Carr) that these were publically held corporations?
Defendant: My understanding is that DAK Americas is your Honor.
Court: So that means the financial statements the annual reports would be public records. The defendant never provided these documents.
In addition Judge Carr stated on page 5 and 6 of the court transcripts dated June 25, 2004:

Court: would it satisfy your request to start, if he (the defendant's counselor) produced the annual reports presumably for the last three years.
Defendants Counselor (Mr. Coleman): Then you can take those reports and look them over. And if there are more questions that they don't answer that you think you need the information from, you can come back to the court and ask for those questions.
Minus: Yes, sir.
Court: Would that suit you?
Minus: Yes sir.

The defendant was in violation by not providing the documents to the plaintiff.

The plaintiff petitioned the court on several occasions and never received the requested information from the defendant as directed by the court. In addition Judge Carr stated that the plaintiff could come back to court if the plaintiff thought that the requested information was needed or not provided by the defendant. Judge Carr then preceded to moot all of the plaintiff's motions and petitions/appeals for information, etc. This is another error on the court's part,

failure to follow through as reference in the court record.

In addition on page four of the court transcript dated June 25, 2004, the defendant's counselor stated that he would produce both DAK Americas LLC and DAK Parent Company but he did not and plaintiff again appealed to the court for information concerning the financial records, statements, and tax records for the preceding three years for both the parent Company DAK Americas LLC, its grand parents, and great grand parents. In addition the plaintiff petitioned the court to add additional defendants but again Judge Carr mooted all of the plaintiff's motions, this resulted in pre-trial violations .

On page nine of the court transcript dated June 25, 2004, the plaintiff requested the defendant's tax records. Judge Carr's failure to comply to his own statements "I'm not going to make them give you the tax report right now but plaintiff never received them at any time when requested during, prior to or later. Plaintiffs would have been in violation if he failed to provide his records to the defendant as requested. Judge Carr again mooted plaintiff's request on his third and final time when he requested the financial records of DAK America LLC. Which again resulted in a pre-trial violation/error.

DAK Americas LLC committed an error when they violated their own termination policy, the plaintiff wrote a grievance asking for more time when given a new policy, within those new policies and procedures it gave you the right to have an attorney review the new policies and forms that the plaintiff was being requested to sign. DAK Americas failed to respond either verbally or in writing to the plaintiff written grievance. DAK Americas policy itself stated that they would respond in writing in a timely manner.

In addition the plaintiff's supervisor Frank Price violated the company's policy (DAK Americas, LLC) in failing to

provide the plaintiff a written copy of the evaluation, in addition Mr. Price admitted that he did not write the evaluation, but another supervisor wrote it. Paul Masker, the supervisor who wrote the evaluation, had never worked with the plaintiff and did not know plaintiff either professionally or personally to be qualified to write and evaluation of the plaintiff. When the plaintiff requested a hard copy of the evaluation, his supervisor Mr. Frank Price refused to provide him with a copy.

Frank Price's poor evaluation of the plaintiff is in contradiction to a previous evaluation Mr. Price gave the plaintiff several months earlier which considered the plaintiff at a higher level then his peers and a outstanding employee as also evaluated by Upper Management, such as Human Resource Manager Rodney Kirk and Richard Parker (then manager of the chemical process technicians at the Cooper River site) when the plaintiff had applied for a supervisor position at another facility within the company prior to the sale of the plant to DAK Americas LLC.

Frank Price's last evaluation given to the plaintiff prior to the poor evaluation was completely opposite the one given on the candidate notification and appraisal form.

DAK Americas LLC violated its on promotion, selection and recruitment policy when they hired three customer service representatives (from another facility) and failed to consider candidates from within the local facility even though they were permanent full time employees and met the requirements for the position.

REASON FOR GRANTING PLAINTIFF'S PETITION

1. Violation of DAK Americas LLC company internal policy in relation to the promotion, selection, and recruitment.

2. Violation of the S.C. Human Affairs Commission Policy, and Laws within the state of South Carolina which prohibit the retaliation against anyone/employee for filing a complaint or testifying on behalf of another employee.

3. Negligence and pre-trial violations caused by the defendant's attorney.

4. Negligence and pre-trial violations due to Judge Carr's motion to moot all of plaintiffs petitions for information in the discovery phase of the trial.

5. Pre-trial violations on Court Rules and Policies by the District Court and Defendant's counsel.

6. DAK Americas LLC failure to respond to plaintiff's grievance per their own policies and procedures in a written response within a timely manner.

7. Judge Norton should have made a recommendation and final judgement in this and not Judge Carr, per Ms. Catrina Murry, the court appointed advisor to the plaintiff in the District Court of Charleston.

8. Violations and pre-trial errors occurred which caused harm to the plaintiff's case when the defendants counsel withheld information during the discovery and after the third motion to compel the defendant to response to plaintiffs request.

9. DAK Americas, LLC continued to commit errors and violate their own policy and procedures when the plant manager stated that the customer service representatives, never transferred between plants, when in fact they did. Gross negligence on the part of the plant manager, due to his

inability to control and supervise the actions of his subordinates.

10. DAK Americas LLC committed errors when DAK's Human Resource Amber Tobin stated "in a letter to Plaintiff that all position would be advertized and posted prior to hiring for position, this was not done. This resulted in gross negligence on the part of Human Resource Generalist, and failure to comply with the South Carolina Human Affairs Commissions procedures, laws and statues relating to the fair employment practices, and the Equal Employment Opportunity Commission laws and statues.

11. Judge Carr committed pre-trial errors when both parties objected to mediation and Judge Carr continued to delay the case by granting mediation sixty days and then the defendant filed for summary judgement and also used this as a delay tactic to gain more time.

12. DAK Americas LLC and Judge Carr errors when refusing to grant subpoena for documents and information from MAU, Inc., Robert Bosch Corporation, Columbia Staffing, and the South Carolina Employment Commission.

13. The defendant DAK Americas LLC failed to follow through with an agreement made in the District Court of Charleston on June 25, 2004. DAK failed to provide the initial documents and information according to the first, second and third motions filed by the plaintiff.

14. Judge Carr granted the plaintiff's permission to return to court for information if the defendant didn't release the requested documents to the plaintiff. Then the Judge (Carr) proceeded to moot all of the plaintiffs petitions/motions/appeals for documents and information.

15. DAK Americas LLC committed errors when they failed to comply with the direction of the court to provide all documents requested by plaintiff to the plaintiff, including

those pertaining to the selling of the plant by E. I. Dupont to DAK Americas, LLC.

CONCLUSION

Wherefore, Plaintiff prays that the Court:

1. Declare the conduct engaged in by defendant to be in violation of Plaintiff's rights.
2. Enjoin Defendant from engaging in such conduct.
3. Compensate Plaintiff for position comparable to that which he was denied.
4. Compensate Plaintiff for years he would have worked until full retirement age of 62.
5. Award plaintiff compensatory and punitive damages.
6. Award plaintiff advisor fees and administrative costs.
7. Grant other relief as it may deem just and proper.
8. Compensate Plaintiff pay and cost of living adjustment as plaintiff would have worked until age 62.
9. Plaintiff seeks to be compensated for wrongful termination, discrimination, harassment, intimidation, and unlawful work practices.
10. Plaintiff see monetary compensation of three million, three hundred thousand dollars ($3,300,000.00).
11. Plaintiff seeks to reverse the decisions of the lower court.

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE GRANTED.

Respectfully submitted,

_____,

GUSSIE MINUS
PO BOX 41813
NORTH CHARLESTON, SC. 29423
843/552-9718

Date: November 18, 2005

APPENDIX

JUDGMENT

FILED: August 23, 2005

UNITED STATES COURT OF APPEALS
for the
Fourth Circuit

No.05-1452
CA-03-4029-2-23

GUSSIE MINUS

Plaintiff - Appellant

V.

DAK AMERICAS

Defendant - Appellee

Appeal from the United States District Court for the District of South Carolina at Charleston

---

In accordance with the written opinion of this Court filed this day, the Court affirms the judgment of the District Court.

A certified copy of this judgment will be provided to the District Court upon issuance of the mandate. The judgment will take effect upon issuance of the mandate.

/s/ Patricia S. Connor

CLERK

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 05-1452

GUSSIE MINUS,

Plaintiff - Appellant,

versus

DAK AMERICAS,

Defendant - Appellee.

Appeal from the United States District Court for the District of South Carolina, at Charleston. Patrick Michael Duffy, District Judge. (CA-03-4029-2-23)

Submitted: August 18, 2005 Decided: August 23, 2005

Before WIDENER, WILLIAMS, and MICHAEL, Circuit Judges.

Affirmed by unpublished per curiam opinion.

Gussie Minus, Appellant Pro Se. Stacy Kaplan Wood, PARKER, POE, ADAMS & BERNSTEIN, L.L.P., Charlotte, North Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

PER CURIAM:

Gussie Minus appeals the district court's order accepting the recommendation of the magistrate judge and granting summary judgment in favor of DAK Americas in Minus' employment discrimination action. We have reviewed the record and find no reversible error. Accordingly, we affirm on the reasoning of the district court. See Minus v. DAK Americas, No. CA-03-4029-2-23 (D.S.C. Mar. 14, 2005). Minus' motions to expedite are denied as moot. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

NOTICE OF ISSUANCE OF MANDATE

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

September 14, 2005

MANDATE

TO: Clerk, District Court/Agency

FROM: Joy Hargett Moore
Deputy Clerk

RE: 05-1452 Minus v. DAK Americas
CA-03-4029-2-23

HEREWITH IS THE MANDATE OF THIS COURT, ISSUED THIS DATE, ON THE JUDGMENT ENTERED BY THE COURT ON 8/23/05.

[ ] Order and Certified Copy of Judgment
[x] Opinion and Certified Copy of Judgment
[ ] Order on Costs
[ ] Order dismissing appeal R42(b) or Local Rule 45
[ ] Other:_____
[ ] The record has been retained for use in case number_____

cc: Gussie Minus
James Walker Coleman IV
Stacy Kaplan Wood

AO450 - Judgment in a Civil Case

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

Gussie Minus,

Plaintiff,

JUDGMENT IN A CIVIL ACTION

vs.

Civil Action No. 2:03-4029-23

Dak Americas LLC,

Defendant.

[X] Decision by Court. This action came before the Court, Honorable Patrick Michael Duffy, District Judge, presiding and the issues having been duly heard and the Court having adopted the report and recommendation of United States Magistrate Judge Robert S. Carr.

IT IS ORDERED AND ADJUDGED that the Plaintiff take nothing, the Defendant Dak Americas LLC's Motion for Summary Judgment is GRANTED and all other pending motions are rendered **MOOT.**

LARRY W. PROPES, Clerk

By: S/ Crystal Perry

Deputy Clerk

March 14, 2005

IN THE DISTRICT COURT OF THE UNITED STATES
DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

GUSSIE MINUS,	)	2:03-CV-4029
	)	
Plaintiff	)	Charleston,
VS	)	South Carolina
	)	June 25, 2004
DAK AMERICAS,	)	
	)	
Defendant	)	

COPY

TRANSCRIPT OF MOTION HEARING
BEFORE THE HONORABLE ROBERT S. CARR,
UNITED STATES DISTRICT MAGISTRATE JUDGE

APPEARANCES:

For the Plaintiff: MR. GUSSIE MINUS, PRO SE
P.O. Box 41813
North Charleston, SC 29423

For the Defendant: MR. JAMES WALKER COLEMAN, ESQ.
Parker Poe Adams
And Bernstein
200 Meeting Street
Suite 301
Charleston, SC 29401

ESR Operator: Dennis Patrick

Transcriber: Amy C. Ruemelin, RPR, CRR
P.O. Box 835
Charleston, South Carolina 29402

Proceedings recorded by Electronic Sound Recording, transcript produced by computer-aided transcription.

AMY C. RUEMELIN, RPR, CRR OFFICIAL COURT REPORTER

AO 88 (Rev. 1/94) Subpoena in a Civil Case

Issued by the

UNITED STATES DISTRICT COURT

DISTRICT OF South Carolina, Charleston Division

GUSSIE MINUS,

Plaintiff,

V.

DAK Americas LLC

Defendant.

SUBPOENA IN A CIVIL CASE

CASE NUMBER:[1] 2:03-4029-18AJ

TO: Columbia Staffing & HealthCare Services
4365 Dorchester Rd.,
Bldg. 100, Suite 108
N. Charleston, SC 29405

☐ YOU ARE COMMANDED to appear in the United States District Court at the place, date, and time specified below to testify in the above case.

PLACE OF TESTIMONY	COURTROOM
	DATE AND TIME

☐ YOU ARE COMMANDED to appear at the place, date, and time specified below to testify at the taking of a deposition in the above case.

PLACE OF DEPOSITION	DATE AND TIME

☒ YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects at the place, date, and time specified below (list documents or objects): **Any and all files, notes, correspondence, personnel records, payroll records, benefits forms, or documents in your possession, custody or control that discuss or relate in any way to your employment of GUSSIE MINUS SS# 251-86-3334.**

PLACE	DATE AND TIME
Parker Poe Adams & Bernstein, LLP Three Wachovia Center, Suite 3000 401 South Tryon Street Charlotte, NC 28202-1935	November 2, 2004

☐ YOU ARE COMMANDED to permit inspection of the following premises at the date and time specified below.

PREMISES	DATE AND TIME

Any organization not a party to this suit that is subpoenaed for the taking of a deposition shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify. Federal Rules of Civil Procedure, 30(b)(6).

ISSUING OFFICER SIGNATURE AND TITLE (INDICATE IF ATTORNEY FOR PLAINTIFF OR DEFENDANT)	DATE
Stacy K. Wood	October 18, 2004

ISSUING OFFICER'S NAME, ADDRESS AND PHONE NUMBER
Stacy K. Wood, Esq., Parker Poe Adams & Bernstein, LLP
Three Wachovia Center, 401 South Tryon Street,
Charlotte, NC 28202

(See Rule 45, Federal Rules of Civil Procedure, Parts C & D on Reverse)

[1] If action is pending in district other than district of issuance, state district under case number.

REVISED 3/29/95

CONFIDENTIAL

DATE RECEIVED BY PERSONNEL: _____

** APPRAISAL OF CANDIDATE FOR MANAGEMENT POSITION **

SELECTION OF FIRST LINE MANAGER DESERVES CAREFUL AND THOROUGH CONSIDERATION BY ALL LEVELS OF MANAGEMENT. THE OBJECTIVE IS TO SELECT INDIVIDUALS WHO HAVE THE QUALITIES THAT MEET THE SELECTION CRITERIA, AND THE POTENTIAL TO DEVELOP INTO BECOMING A COMPETENT AND EFFECTIVE LEADER.

AS A MEMBER OF MANAGEMENT, YOU ARE REQUESTED TO GIVE YOUR APPRAISAL OF THE CANDIDATE YOU HAVE SELECTED, COMMENTING ON THEIR PAST JOB PERFORMANCE AND LEADERSHIP POTENTIAL.

NAME: Ron Nevius P.R. NO.: _____

PRESENT JOB: CP operator AREA: CP

AGE: _____

SHIFT: _____ IMMED. SUPV.: Frank Price EXT. _____

SECTION/AREA MANAGER APPROVAL

SIGNED: _____

AREA: _____

DATE: _____

ORGANIZATION APPROVAL
(BY THE ORG. REPRESENTATIVE ON THE SELECTION TEAM)

SIGNED: _____

I. PERSONAL DATA AND WORK HISTORY

A. LIST BELOW THE JOBS THE CANDIDATE HAS HAD WITH DU PONT DURING THE LAST 3-5 YEARS. SHOW DATES AND JOB TITLES FOR EACH JOB. NOTE HOW WORK AND INDIVIDUAL PREPARED FOR MANAGER JOB.

CP

Staple Davis PA

In The United States District Court
For the District of South Carolina
Charleston Division

Gussie Minus:	)	Case No.: 2:03-4029-18AJ
	)	
	)	Second Motion to Compel
	)	Subpoena for
Documents		
Plaintiff,	)	Previously Requested
	)	
VS	)	
	)	
DAK Americas LLC,	)	
	)	
Defendant	)	
	)	

ORIGINAL FILED
NOV - 2 2004
LARRY W PROPES, CLERK
CHARLESTON, SC

Notice is hereby given that Gussie Minus in the above mentioned cases is requesting the granting of an issuance of subpoena's to below listed parities. Requesting supporting documents as evidence in the above captioned case, In the above mentioned case Plaintiff is asking the court to Compel Defendant to provide tax record's for the last three (3) years of companies existence. This information was previously requested and the court granted plaintiff the right to return and request said documents if and when needed. This information is essential to the discovery phase of this case. Plaintiff is also requesting all record's concerning the sale of the Cooper River Site between I. E. Dupont and DAK Americas. The Defendant has stated that because they aren't a publicly traded company there are no financial records/reports available to the public. Since this case is in the hands of the court all information pertain to assist with the quick resolution of this case is needed so Plaintiff can have it studied and analyzed as evidence in this case.

September 29, 2004

VIA CERTIFIED MAIL
MAU, Inc.
Attn.: Office Manager
5101 Rivers Ave., Ste. 107, North Charleston, SC 29406

Re: Gussie Minus v. DAK Americas LLC.
In the District of South Carolina, Charleston Division
Civil Action No.: 2:03-CV-4029-18AJ

To Whom It May Concern:

We represent DAK Americas LLC in a lawsuit filed against it by Gussie Minus. Enclosed is a Subpoena for documents concerning your employment of Mr. Minus. I have also enclosed an affidavit by which you can verify that the documents you provide are true and accurate copies. This will allow us to avoid having to take your deposition simply to authenticate these documents. Please mail any and all responsive documents to the following address by Wednesday, October 13, 2004:

Stacy K. Wood, Esquire
Parker Poe Adams & Bernstein, L.L.P.
Three Wachovia Center
401 South Tryon Street, Suite 3000
Charlotte, North Carolina 28202

Please include your invoice for photocopying charges and we will gladly reimburse you. Also, since this information is needed as soon as possible, I will be glad to reimburse you any fees you incur in sending these materials to my office via Federal Express or a similar carrier. Should you need any additional information or if you have any questions, please do not hesitate to call me at (704) 335-9844.

Thank you in advance for your cooperation.

Very truly yours,
/s/
Stacy K. Wood

/src
Encl.

cc: Gussie Minus

September 29, 2004

VIA CERTIFIED MAIL
Columbia Staffing and HealthCare
Attn.: Personnel Manager
4365 Dorchester Road, Building 100, Suite 108
North Charleston, SC 29405

Re: Gussie Minus v. DAK Americas LLC.
In the District of South Carolina, Charleston Division
Civil Action No.: 2:03-CV-4029-18AJ

To Whom It May Concern:

We represent DAK Americas LLC in a lawsuit filed against it by Gussie Minus. Enclosed is a Subpoena for documents concerning your employment of Mr. Minus. I have also enclosed an affidavit by which you can verify that the documents you provide are true and accurate copies. This will allow us to avoid having to take your deposition simply to authenticate these documents. Please mail any and all responsive documents to the following address by Monday, November 2, 2004:

Stacy K. Wood, Esquire
Parker Poe Adams & Bernstein, L.L.P.
Three Wachovia Center
401 South Tryon Street, Suite 3000
Charlotte, North Carolina 28202

Please include your invoice for photocopying charges and we will gladly reimburse you. Also, since this information is needed as soon as possible, I will be glad to reimburse you any fees you incur in sending these materials to my office via Federal Express or a similar carrier. Should you need any additional information or if you have any questions, please do not hesitate to call me at (704) 335-9844.

Thank you in advance for your cooperation.

Very truly yours,
/s/
Stacy K. Wood

/src
Encl.

cc: Gussie Minus

U.S. COURT OF APPEALS, FOURTH DISTRICT
U.S. COURTHOUSE ANNEX, 5TH FLOOR
RICHMOND, VIRGINA

GUSSIE MINUS,
Plaintiff,
vs.
DAK AMERICAS, LLC,
Defendant

Case No.: No. 04-2544
PLEADING AND PETITION
TO APPEAL

FILED
FEB 16 2005
U.S. Court of Appeals
Fourth Circuit

Plaintiff appeals and petitions the U.S. Appeals court to reverse Judge Carr recommendations and to moot all plaintiffs' motions.

Based on the fact that, if a party objects to a discovery request or otherwise refuses to disclose certain information, his is required to comply with Rule 26(b) (5) of the Federal rules of Civil Procedure:

When a party withholds information otherwise discoverable under these Rules by claiming that is privileged or subject to protection as trial preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclose in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection. Fed. R. Civ. P. 26(b) (5)

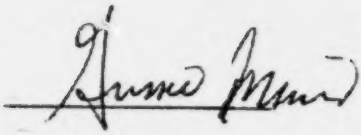
Finally the plaintiff would like to emphasize the importance of producing these documents, as the discovery rules entitle plaintiff to the "right to

13. Award plaintiff compensatory and punitive damages.
14. Award plaintiff adviser fees and administration costs.
15. Grant other relief as it may deem just and proper.
16 Compensate Plaintiff pay and cost of living adjustment as plaintiff would have worked until age 62.
17. Plaintiff seeks to be compensated for wrongful termination, discrimination, harassment, intimidation, and unlawful work practices.
18. Plaintiff see monetary compensation of three million, three hundred thousand dollars, and ($3,300,000.00).
19. Plaintiff seeks to reverse the decisions of the lower court.

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE GRANTED.

David Mims November 18, 2005

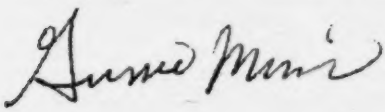
Respectfully submitted,



GUSSIE MINUS

PO BOX 41813

NORTH CHARLESTON, SC. 29423



Date:

November 18 2005

07/28/97 09:44 8043832911 DONNA KOULTON 002

07/25/97 16:45 COOPER RIVER → 8043832911 002

Per your request - returning info on Supervisory Candidate.

DS McNeely
Spruance Personnel mgr.

REVISED 3/29/95

CONFIDENTIAL

DATE RECEIVED BY PERSONNEL: _____

*** * APPRAISAL OF CANDIDATE FOR MANAGEMENT POSITION * ***

SELECTION OF FIRST LINE MANAGER DESERVES CARRFUL AND THOROUGH ONSIDERATION BY ALL LEVELS OF MANAGEMENT. THE OBJECTIVE IS TO SELECT NDIVIDUALS WHO HAVE THE QUALITIES THAT MEET THE SELECTION CRITERIA, AND THE OTENTIAL TO DEVELOP INTO BECOMING A COMPETENT AND EFFECTIVE LEADER.

AS A MEMBER OF MANAGEMENT, YOU ARE REQUESTED TO GIVE YOUR APPRAISAL OF HE CANDIDATE YOU HAVE SELECTED, COMMENTING ON THEIR PAST JOB PERFORMANCE AND EADERSHIP POTENTIAL.

***

Supreme Court, U.S.
FILED

05-931 NOV 18 2005

OFFICE OF THE CLERK

No.

IN THE

SUPREME COURT OF THE UNITED STATES

GUSSIE MINUS,

Petitioner,

v.

DAK AMERICAS LLC,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI –
REPORT AND RECOMMENDATION OF THE MAGISTRATE JUDGE, dated DECEMBER 28, 2004

[Filed DEC 28 2004]
[Entered 12/29/04]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

C.A. No. 2:03-4029-18AJ

GUSSIE MINUS,

Plaintiff,

-versus-

DAK AMERICA LLC,

Defendant.

REPORT AND RECOMMENDATION

This employment case alleging violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et. seq.*, is before the undersigned United States Magistrate Judge for a report and recommendation on the defendant's motion for summary judgment under Rule 56 of the

Federal Rules of Civil Procedure on all causes of action. 28 U.S.C. §636(b).

The plaintiff, Gussie Minus, an African-American, filed this action on December 18, 2003, against his former employer, defendant DAK Americas LLC ("DAK"), and asserted claims of discriminatory termination and failure to promote on the basis of his race and in retaliation for engaging in protected activities in violation of Title VII. Discovery is complete.

The defendant filed the instant motion on September 24, 2004 and on September 28, 2004, Minus was provided a copy of the motion and was given an explanation of dismissal and summary judgment procedure as well as pertinent extracts from Rules 12 and 56 of the Federal Rules of Civil Procedure similar to that required by *Roseboro v. Garrison,* 528 F.2d 309 (4th Cir. 1975). Minus responded to the motion on October 25, 2004 and October 26, 2004. On November 5, 2004, DAK filed a reply to Minus' oppositions.[1] Therefore it appears consideration of the motion is appropriate.

SUMMARY JUDGMENT STANDARD

To grant a motion for summary judgment, this court first must find that "there is no genuine issue as to any material fact." Fed.R.Civ.P. 56(c). The judge is not to weigh the evidence, but rather to determine if there is a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). If no material factual disputes

[1] On November 17, 2004, Minus filed a motion to add an additional defendant, E.I. DuPont, Inc. and explained he wanted to add Dupont so that he could obtain its tax records and other of its financial information. That motion is denied.

remain, then summary judgment should be granted against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case and on which the party bears the burden of proof at trial. *Celotex Corp. v. Cattrett*, 477 U.S. 317 (1986). All evidence should be viewed in the light most favorable to the non-moving party. *Perini Corp. v. Perini Constr., Inc.*, 915 F.2d 121, 123-23 (4th Cir. 1990). Once a motion for summary judgment is properly made and supported, the opposing party has the burden of showing that a genuine dispute exists. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986). "[W]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, disposition by summary judgment is appropriate." *Teamsters Joint Council No. 83 v. CenTra, Inc.*, 947 F.2d 115, 119 (4th Cir. 1991); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49 (1986). Unsupported speculation is not enough to withstand a motion for summary judgment. *Ash v. United Parcel Service, Inc.*, 800 F.2d 409, 411-12 (4th Cir. 1986). Indeed, the court should draw reasonable inferences on behalf of the non-moving party, but it must not slip into "sheer speculation." The court may not move beyond inference and into the realm of mere conjecture. *Lovelace v. Sherwin-Williams Co.*, 681 F.2d 230, 242 (4th Cir. 1982).

FACTS

The facts, either undisputed or according to the plaintiff as the non-moving party, with all reasonable inferences therefrom, to the extent supported by the record, are as follow.

DAK produces and sells a variety of polyester-based materials used in clothing, home furnishings and indus-

trial products and is headquartered in Charlotte, North Carolina. DAK has three manufacturing facilities: Wilmington, North Carolina, Fayetteville, North Carolina, and Charleston, South Carolina.

Before plaintiff became an employee of DAK, he was employed by E.I. DuPont at its Cooper River facility in Charleston, South Carolina. DuPont hired plaintiff on December 12, 1978, as an Operator in its Yarn Department. Plaintiff subsequently was transferred to work as an Operator in DuPont's Staple Department and then was promoted to Chemical Technician, where he worked until July 31, 2001.

On August 1, 2001, DAK's parent company acquired part of DuPont's U.S. Polyester Enterprise business, which included the Charleston facility where plaintiff worked. During the acquisition, DAK made an offer of employment to plaintiff, which he accepted. On August 1, 2001, plaintiff was officially hired by DAK as a Chemical Technician at its Cooper River facility.

In the spring of 2002, DAK implemented a new performance evaluation system. (Minus Dep. at p. 30; Warnock Aff. para. 6). Both the style and the evaluation form itself were different from DuPont's evaluation form. (Minus Dep. at p. 30). All DAK employees, including plaintiff, were informed that since this was a new system, the results of the first performance evaluations would have no bearing on employees' variable compensation for 2001; the evaluations would simply be used as a benchmark for how performance would be judged by DAK in the future. (Minus Dep. at pp. 30-31; Warnock Aff. para. 7).

In early June 2002, plaintiff met with his supervisor, William Frank Price, to review his 2001 Performance

Evaluation. (Minus Dep. at p. 31). Price rated plaintiff's work performance "below expectations" in four (4) out of eight (8) categories, including initiative and energy, problem solving, dependability and commitment, and teamwork and interaction skills. (Minus Dep. Exh. 7). In addition, plaintiff's overall performance for 2001 was rated "below expectations." (Minus Dep. at pp. 32-33 and Dep. Exh. 7).

On June 8, 2002, plaintiff filed an internal grievance alleging that his negative 2001 Performance Evaluation was in retaliation for filing a South Carolina Human Affairs Commission ("SCHAC")/Equal Employment Opportunity Commission ("EEOC") charge against his former employer, DuPont.[2] (Minus Dep. at p. 33 and Dep. Exh. 8). DAK investigated plaintiff's grievance and concluded that plaintiff's 2001 Performance Evaluation was based solely on his performance, and not on retaliation. (Minus Dep. Exh. 14).

On or about November 18, 2002, plaintiff filed a charge of discrimination with SCHAC and the EEOC against DAK, alleging, in part, race discrimination and retaliation ("DAK Charge #1"). (Minus Dep. at pp. 49-50 and Dep. Exh. 15). Plaintiff's allegations of discrimination and retaliation were based on his 2001

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[2] Before he was employed by DAK, Plaintiff filed two separate charges of discrimination with SCHAC/EEOC against his former employer, DuPont. The first charge, 146990345, filed in March 1999, alleged race and age discrimination ("DuPont Charge #1"). (Minus Dep. Exh. 1). The second charge, 13CA00449, filed in February 2000, alleged race discrimination, age discrimination and retaliation ("DuPont Charge #2"). (Minus Dep. Exh. 3). The EEOC issued a Dismissal and Notice of Rights for both charges. (Minus Dep. Exhs. 2, 4). Plaintiff filed an unsuccessful lawsuit against DuPont on the basis of DuPont Charge #2. (Minus Dep. at pp. 24-26).

Performance Evaluation and his non-selection for a Customer Service Representative position at DAK. (Minus Dep. Exh. 15). On July 2, 2003, SCHAC issued a Dismissal and Notice of Rights, finding "no cause" as to Plaintiff's claims. (Minus Dep. Exh. 16). Subsequently, on September 22, 2003, the EEOC issued its Dismissal and Notice of Rights, affirming SCHAC's findings. (Minus Dep. Exh. 17).

In 2003, DAK again conducted performance evaluations of all its employees, including plaintiff, evaluating their performance in 2002. (Minus Dep. at p. 65). In this 2002 Performance Evaluation, plaintiff was rated "needs improvement" in five (5) out of eight (8) categories, including quality of work, initiative and energy, problem solving, dependability and commitment, and teamwork and interaction skills. (Minus Dep. Exh. 20). Again, plaintiff's overall performance was rated "below expectation." (Minus Dep. at p. 67 and Dep. Exh. 20). Although plaintiff disagreed with the 2002 Performance Evaluation, he neither filed an internal grievance with DAK nor a SCHAC/EEOC charge. (Minus Dep. at pp. 66-67).

In September 2002, due to the implementation of a new software program and the expansion of some of DAK's product lines, DAK needed individuals to fill three Customer Service Representative ("CSR") positions in Wilmington, North Carolina. Among other things, these CSRs are responsible for facilitating communication between DAK's sales department and its customers, as well as scheduling and planning customers' production needs. (Id. para. 19). DAK does not have a policy or practice of considering employees at one facility for open positions at another facility. *Id.*

In fact, with the exception of Director of Operations Matt Warrick, DAK has never transferred or promoted employees between its Wilmington and Cooper River facilities. *Id.*

After reviewing the resumes of the individuals who expressed an interest in the CSR positions, DAK chose three individuals, Brenda Owens, Pamela Johnson and Sherry Cowan, all of whom had significant past experience in customer service positions. *Id.* para. 21. Both Owens and Johnson had previously worked for DuPont in substantially similar customer service roles; Owens had worked for DuPont for twenty-nine (29) years and Johnson had worked for DuPont for twenty-five (25) years. *Id.* Similarly, prior to her employment with DAK, Cowan had worked for over ten (10) years in various customer service roles. *Id.* para. 22. Moreover, prior to accepting the permanent CSR positions, Owens, Johnson and Cowan had been working as temporary employees at DAK's Wilmington facility, where they assisted in CSR roles. *Id.* para. 23.

On June 9, 2003, DAK's corporate Human Resources ("HR") Department sent an e-mail to all DAK employees attaching links to the following four new employment policies: (1) Code of Business Conduct and Ethics Policy, (2) Confidentiality and Intellectual Property Agreement, (3) Electronic Communications Policy, and (4) Unlawful Harassment Policy. (Minus Dep. at pp. 69-71 and Dep. Exh. 21). As a condition of continued employment, all DAK employees were required to read the policies carefully, print two copies of each, sign each copy, return one signed copy to their site HR representative, and keep one sign copy for their personal files. *Id.* Employees were expressly advised that if they had any questions regarding

the policies, they should contact their site HR representative. *Id.* Plaintiff received this e-mail. (Minus Dep. at p. 69).

Due to the failure of some employees, including plaintiff, to comply with the June 9th e-mail, on June 23, 2003, Amber Tobin, a DAK HR Specialist, sent another e-mail to all DAK employees reminding them that they were required to read, sign and return the policies by no later than June 30, 2003. (Minus Dep. at p. 73 and Dep. Exh. 22). Plaintiff received this e-mail and read all of the policies, but he did not sign and return them by June 30, 2003, or any later date. (Minus Dep. at pp. 73-75). On June 29, 2003, Greg Southerland, plaintiff's supervisor, gave plaintiff hard copies of the four policies, asked him to sign them and advised plaintiff that any questions should be referred to DAK's site HR representative, Tobin. (Minus Dep. at p. 78 and Dep. Exh. 23). The following day, June 30, 2003, plaintiff submitted a letter to DAK's corporate HR Manager requesting additional time to have his attorney review the policies. (Minus Dep. Exh. 23). Plaintiff does not recall if he made any efforts to consult with an attorney or ask questions of any DAK HR representative between his initial receipt of the policies on June 9th and the June 30, 2003, deadline for their return. (Minus Dep. at pp. 82-83).

By July 15, 2003, more than five weeks after the policies were initially sent to plaintiff, he still had not signed and returned them to DAK. *Id.* at pp. 91-92. Plaintiff does not recall whether he called any attorneys between June 30th and July 15, 2003, in an effort to get his questions answered. *Id.* at p. 97. In any event, on July 15, 2003, Ron Warnock, DAK's HR Manager for the Charleston facility, and Southerland met with plaintiff to discuss the situation. (*Id.* at pp. 92-93). During that meet-

ing, Warnock emphasized to plaintiff that signing the policies was a condition of continued employment at DAK. *Id.* at p. 93). Warnock informed plaintiff that at that time plaintiff was the only DAK employee at the facility who had not complied with this requirement, and plaintiff is not aware of any other employee at DAK's Cooper River facility who did not sign and return the policies by July 15, 2003. (Minus Dep. at p. 93; Warnock Aff. para. 26). Warnock and Southerland answered questions for plaintiff and then gave him time to review the documents in private. (Minus Dep. at pp. 94-96). While Warnock and Southerland were out of the conference room, plaintiff re-read the policies. *Id.* at p. 95. After Warnock and Southerland returned to the conference room, and on more than one occasion during the July 15, 2003 meeting, Warnock asked plaintiff to reconsider his decision not to sign the policies. *Id.* at p. 96. Warnock told plaintiff he would recommend the termination of plaintiff's employment if he did not sign the forms. *Id.* Plaintiff still refused to sign the policies; Warnock escorted plaintiff from the facility and informed him that he was recommending termination effective July 15, 2003. (Minus Dep. at pp. 98-99 and Dep. Exh. 25).

On July 31, 2003, plaintiff participated in a DAK Personnel Case Review ("PCR") meeting to review his termination. (Minus Dep. at p. 103 and Dep. Exh. 27). At no time during the PCR meeting did plaintiff offer to sign the policies, and he cannot recall any mention of his EEOC charges during the meeting. (Minus Dep. at p. 110). At the conclusion of the PCR meeting, Warnock and Southerland informed plaintiff that he was no longer employed by DAK. *Id.* at pp. 109-10.

After the PCR meeting, on September 29, 2003, plaintiff filed a second SCHAC/EEOC charge against DAK, alleging race discrimination and retaliation based on his termination from employment (DAK Charge #2). (Minus Dep., at pp. 116-17 and Dep. Exh. 28). On December 17, 2003, the EEOC issued its Dismissal and Notice of Rights, finding "no cause" concerning plaintiff's claims. (Minus Dep. Exh. 30).

TITLE VII LAW

In his Title VII charges (DAK Charges #1 and #2), plaintiff alleged that the following employment actions by DAK were motivated by race and retaliation: (1) his negative 2001 Performance Evaluation conducted in June 2002; (2) his non-selection for a Customer Service Representative position in September 2002; and (3) his termination from employment in July 2003. (Minus Dep. at pp. 50, 118 and Dep. Exhs. 15 and 28).

To prevail on his discrimination claim, plaintiff must prove by a preponderance of the evidence that "but for" the employer's motive to discriminate against him because of his race or protected activity, the adverse employment actions about which he complains would not have occurred. *See, Henson v. Liggett Group, Inc.*, 61 F.3d 270, 274 (4th Cir. 1995); *EEOC v. Clay Printing Co.*, 955 F.2d 936, 940 (4th Cir. 1992).

Under Title VII, a plaintiff has two alternative avenues of proof to meet this burden: (1) a "pretext" framework judicially created for use in federal discrimination cases; or (2) a "mixed-motive" framework. *E.E.O.C. v. Warfield-Rohr Casket Co., Inc.*, 364 F.3d 160, 163 (4th Cir. 2004). Here the only avenue of proof is the "pretext" framework.

The United States Supreme Court first articulated the familiar burden shifting proof scheme for analyzing cases of employment discrimination in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). First, plaintiff must prove, by a preponderance of evidence, a *prima facie* case of race discrimination. To establish a *prima facie* case of discrimination under Title VII, a plaintiff must prove that: (1) he is a member of a protected class; (2) he suffered an adverse employment action; (3) at the time of the action, he was performing at a level that met his employer's legitimate job expectations; and (4) his position remained open or was filled by a similarly qualified applicant outside the protected class. *See, e.g., Murray v. United Food & Commercial Workers Union*, 100 Fed. Appx. 165, 171-72. 2004 WL 1254979 (4th Cir. 2004) (citing *Reeves v. Sanderson Plumbing, Inc.*, 530 U.S. 133, 142 (2000)); *Love-Lane v. Martin*, 355 F.3d 766, 787 (4th Cir. 2004).

To establish a *prima facie* case of retaliation under Title VII, a plaintiff must prove the following by a preponderance of the evidence: (1) that he engaged in protected activity; (2) that the employer took adverse employment action against him; and (3) that a causal connection existed between the protected activity and the adverse action. *Honor v. Booz-Allen & Hamilton, Inc.*, 383 F.3d 180 (4th Cir. 2004).

If this burden is met, a rebuttable presumption of discrimination then arises and the burden of production shifts to the defendant to articulate a legitimate, nondiscriminatory reason for the challenged employment decision. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 506-08 (1993); *Hill v. Lockheed Martin Logistics Mgmt., Inc.*, 354 F.3d 277, 285 (4th Cir. 2004).

Once the defendant meets its burden of production, the presumption created by the *prima facie* case "drops out of the picture", and the burden shifts back to plaintiff to prove by a preponderance of the evidence that DAK's asserted reasons for the challenged employment actions were pretextual, that is, not the true reasons for the employment decisions, and that the true reason was intentional discrimination by the employer on the basis of Plaintiff's race and retaliation. *St. Mary's*, 509 U.S. at 510-11, 515-17; *Hill*, 354 F.3d at 285. At this point, the burden to demonstrate pretext "merges with the ultimate burden of persuading the court that [the plaintiff] has been the victim of intentional discrimination." *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 256, 101 S.Ct. 1089 (1974).

DISCUSSION

A review of the record and relevant case law reveals that the defendant's motion should be granted.

For purposes of its summary judgment motion, DAK assumes that plaintiff can establish the elements of his *prima facie* case of discrimination, thus shifting the burden of production to DAK to articulate a legitimate, nondiscriminatory reason for each of the adverse employment decisions about which plaintiff complains. The defendant's argument is that the plaintiff has only his own conclusory belief that DAK's proffered reasons for its action are just pretext for the real reason, illegal discrimination. Therefore, the defendant is entitled to judgment as a matter of law.

a. 2001 Performance Evaluation

When DAK implemented a new performance evaluation system in the spring of 2002, all DAK employees, including plaintiff, were informed that since it was a new system, the results of the first performance evaluations would have no bearing on employees' variable compensation for the prior year. Rather, the evaluations would be used as a benchmark for how performance would be judged by DAK in the future. Plaintiff's 2001 Performance Evaluation indicated that he needed to improve his work performance in four (4) out of eight (8) categories, and he received an overall evaluation of "below expectations." Plaintiff disagreed with this evaluation and pursued an internal grievance alleging retaliation. DAK investigated and concluded that plaintiff's 2001 Performance Evaluation was based solely on his performance, and there was no validity to his retaliation allegations. White employees who never filed charges of discrimination also received an overall rating of "below expectations" in their 2001 performance evaluations.

Plaintiff claims his 2001 Performance Evaluation[3] was motivated by race and retaliation discrimination because: (1) he believes his performance was good; and (2) his attendance rating within the evaluation was lower than two white employees who Plaintiff alleges had more absences than he did. (Minus Dep. at pp. 57, 51). However, the case law makes clear that a plaintiff's unsubstantiated beliefs about his performance are

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[3] It also appears that the plaintiff did not suffer an actionable adverse employment action since the review did not result in an adverse effect on the terms, conditions, or benefits of his employment. See, e.g., *Von Gunten v. Maryland*, 243 F.3d 858, 865-68 (4th Cir. 2001).

insufficient to establish discrimination. *See, Evans v. Technologies Applications & Serv. Co.*, 80 F.3d 954, 960 (4th Cir. 1996) (finding that the plaintiff's unsubstantiated allegations and bald assertions concerning her own qualifications and the shortcoming of her co-workers failed to disprove the employer's explanation for its decision or to show discrimination); *see also, Goldberg v. B. Green & Co.*, 836 F.2d 845, 848 (4th Cir. 1988) (noting that plaintiffs "own naked opinion, without more, is not enough to establish discrimination"). Moreover, although plaintiff may disagree with DAK's evaluation of his performance, that disagreement alone does not render DAK's business decision illegitimate or untrue. *See, Beau v. Abbott Labs*, 130 F.3d 614, 620 (4th Cir. 1997) (courts leave to employer's discretion the method of evauating an employee's job performance); *see also, Smith v. Flax*, 618 F.2d 1062, 1067 (4th Cir. 1980) (stating that "it is the perception of the decision maker which is relevant," not the self assessment of the plaintiff).

Next, as far as the plaintiff's contention that two white employees were absent from work more than he was, he deposed that he did not know why they were absent, or whether those absences were protected by the Family and Medical Leave Act. (Minus Dep. at pp. 52-53). Moreover, he has never seen either employee's personnel file, *Id.* at 115-16, so he has no credible basis for comparing their 2001 Performance Evaluations to his. His claim fails since he has not forecast evidence that DAK's legitimate, nondiscriminatory reasons for his 2001 Performance Evaluation were a pretext for intentional discrimination. *See, e.g., Weeks v. Union Camp Corp.*, 215 F.3d 1323 (4th Cir. 2000) (affirming summary judgment for the employer on plaintiffs Title VII claim

where plaintiff failed to show that his conduct was comparable to other employees who were treated differently).

b. September 2002 CSR positions

In September 2002, DAK needed individuals to fill three CSR positions in North Carolina.

Plaintiff neither applied for the position nor informed anyone at DAK of his interest in the positions. (Warnock Aff. para. 24). After reviewing the resumes of the individuals who did express an interest in the CSR positions, DAK chose three individuals all of whom had significant past experience in customer service positions and who had assisting in CSR roles.

Plaintiff has no evidence whatsoever to support his claim that his non-selection for a CSR position was motivated by race or retaliation. First, DAK had no knowledge that plaintiff was even interested in a CSR position; Plaintiff neither applied for the position nor informed anyone at DAK of his interest. Absent such knowledge by DAK, plaintiff's failure to be selected cannot be the result of intentional discrimination.

Second, even if plaintiff had applied, he cannot show that he was better qualified than the candidates who were selected. *See, Evans v. Technologies Applications & Serv. Co.*, 80 F.3d 954, 960 (4th Cir. 1996) (noting that in discrimination claim based on failure to promote, plaintiff must establish that he was better qualified candidate for position sought). Plaintiff admitted that he knew nothing about the work history, experience or qualifications of the candidates selected. (Minus Dep. at p. 55). In light of DAK's uncontroverted evidence of the selectees' relative qualifications, plaintiff's claim fails as a matter of law.

c. July 2003 termination

DAK has presented evidence that the reason it terminated plaintiff's employment was because the plaintiff refused to sign and return company policies, despite ample time for review and questioning. Plaintiff was clearly apprised of and understood the consequences of his failure to sign the policies, and he was given numerous opportunities to ask questions, obtain information and reconsider his position. Moreover, he was aware that he was the sole employee at the plant who did not sign the policies when he was fired.

Here, it appears that DAK has demonstrated that its decisions regarding plaintiff's employment were based on legitimate, nondiscriminatory factors unrelated to race or retaliation and that the plaintiff has presented nothing but his wholly insufficient beliefs in rebuttal. There is no dispute that plaintiff refused to sign and return various company policies and that his employment was terminated because of that refusal. There is also no dispute that by the time Plaintiff was fired he was the only employee who did not sign and return the policies. Moreover, plaintiff was fully aware that signing and returning the policies was a condition of continued employment at DAK. Although plaintiff may disagree with this requirement, his disagreement alone, absent any suggestion of unequal treatment, does not render DAK's termination decision illegitimate or untrue.

CONCLUSION

Accordingly, for the aforementioned reasons, it appears there is no genuine issue of material fact sufficient to withstand summary judgment. Therefore it is recommended that the defendant's motion for summary judgment be granted, all other motions be deemed moot, and this matter ended.

Respectfully Submitted,

/s/ Robert S. Carr
Robert S. Carr
United States Magistrate Judge

Charleston, South Carolina
December 28, 2004

Supreme Court, U.S.
FILED

05-931 NOV 18 2005

OFFICE OF THE CLERK

No.

IN THE

SUPREME COURT OF THE UNITED STATES

GUSSIE MINUS,

Petitioner,

v.

DAK AMERICAS LLC,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI –
REPORT AND RECOMMENDATION OF THE MAGISTRATE JUDGE, dated DECEMBER 28, 2004

[Filed DEC 28 2004]
[Entered 12/29/04]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

C.A. No. 2:03-4029-18AJ

GUSSIE MINUS,

Plaintiff,

-versus-

DAK AMERICA LLC,

Defendant.

REPORT AND RECOMMENDATION

This employment case alleging violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et. seq.*, is before the undersigned United States Magistrate Judge for a report and recommendation on the defendant's motion for summary judgment under Rule 56 of the

Federal Rules of Civil Procedure on all causes of action. 28 U.S.C. §636(b).

The plaintiff, Gussie Minus, an African-American, filed this action on December 18, 2003, against his former employer, defendant DAK Americas LLC ("DAK"), and asserted claims of discriminatory termination and failure to promote on the basis of his race and in retaliation for engaging in protected activities in violation of Title VII. Discovery is complete.

The defendant filed the instant motion on September 24, 2004 and on September 28, 2004, Minus was provided a copy of the motion and was given an explanation of dismissal and summary judgment procedure as well as pertinent extracts from Rules 12 and 56 of the Federal Rules of Civil Procedure similar to that required by *Roseboro v. Garrison*, 528 F.2d 309 (4th Cir. 1975). Minus responded to the motion on October 25, 2004 and October 26, 2004. On November 5, 2004, DAK filed a reply to Minus' oppositions.[1] Therefore it appears consideration of the motion is appropriate.

SUMMARY JUDGMENT STANDARD

To grant a motion for summary judgment, this court first must find that "there is no genuine issue as to any material fact." Fed.R.Civ.P. 56(c). The judge is not to weigh the evidence, but rather to determine if there is a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). If no material factual disputes

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[1] On November 17, 2004, Minus filed a motion to add an additional defendant, E.I. DuPont, Inc. and explained he wanted to add Dupont so that he could obtain its tax records and other of its financial information. That motion is denied.

remain, then summary judgment should be granted against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case and on which the party bears the burden of proof at trial. *Celotex Corp. v. Cattrett*, 477 U.S. 317 (1986). All evidence should be viewed in the light most favorable to the non-moving party. *Perini Corp. v. Perini Constr., Inc.*, 915 F.2d 121, 123-25 (4th Cir. 1990). Once a motion for summary judgment is properly made and supported, the opposing party has the burden of showing that a genuine dispute exists. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986). "[W]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, disposition by summary judgment is appropriate." *Teamsters Joint Council No. 83 v. CenTra, Inc.*, 947 F.2d 115, 119 (4th Cir. 1991); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49 (1986). Unsupported speculation is not enough to withstand a motion for summary judgment. *Ash v. United Parcel Service, Inc.*, 800 F.2d 409, 411-12 (4th Cir. 1986). Indeed, the court should draw reasonable inferences on behalf of the non-moving party, but it must not slip into "sheer speculation." The court may not move beyond inference and into the realm of mere conjecture. *Lovelace v. Sherwin-Williams Co.*, 681 F.2d 230, 242 (4th Cir. 1982).

FACTS

The facts, either undisputed or according to the plaintiff as the non-moving party, with all reasonable inferences therefrom, to the extent supported by the record, are as follow.

DAK produces and sells a variety of polyester-based materials used in clothing, home furnishings and indus-

trial products and is headquartered in Charlotte, North Carolina. DAK has three manufacturing facilities: Wilmington, North Carolina, Fayetteville, North Carolina, and Charleston, South Carolina.

Before plaintiff became an employee of DAK, he was employed by E.I. DuPont at its Cooper River facility in Charleston, South Carolina. DuPont hired plaintiff on December 12, 1978, as an Operator in its Yarn Department. Plaintiff subsequently was transferred to work as an Operator in DuPont's Staple Department and then was promoted to Chemical Technician, where he worked until July 31, 2001.

On August 1, 2001, DAK's parent company acquired part of DuPont's U.S. Polyester Enterprise business, which included the Charleston facility where plaintiff worked. During the acquisition, DAK made an offer of employment to plaintiff, which he accepted. On August 1, 2001, plaintiff was officially hired by DAK as a Chemical Technician at its Cooper River facility.

In the spring of 2002, DAK implemented a new performance evaluation system. (Minus Dep. at p. 30; Warnock Aff. para. 6). Both the style and the evaluation form itself were different from DuPont's evaluation form. (Minus Dep. at p. 30). All DAK employees, including plaintiff, were informed that since this was a new system, the results of the first performance evaluations would have no bearing on employees' variable compensation for 2001; the evaluations would simply be used as a benchmark for how performance would be judged by DAK in the future. (Minus Dep. at pp. 30-31; Warnock Aff. para. 7).

In early June 2002, plaintiff met with his supervisor, William Frank Price, to review his 2001 Performance

Evaluation. (Minus Dep. at p. 31). Price rated plaintiff's work performance "below expectations" in four (4) out of eight (8) categories, including initiative and energy, problem solving, dependability and commitment, and teamwork and interaction skills. (Minus Dep. Exh. 7). In addition, plaintiff's overall performance for 2001 was rated "below expectations." (Minus Dep. at pp. 32-33 and Dep. Exh. 7).

On June 8, 2002, plaintiff filed an internal grievance alleging that his negative 2001 Performance Evaluation was in retaliation for filing a South Carolina Human Affairs Commission ("SCHAC")/Equal Employment Opportunity Commission ("EEOC") charge against his former employer, DuPont.[2] (Minus Dep. at p. 33 and Dep. Exh. 8). DAK investigated plaintiff's grievance and concluded that plaintiff's 2001 Performance Evaluation was based solely on his performance, and not on retaliation. (Minus Dep. Exh. 14).

On or about November 18, 2002, plaintiff filed a charge of discrimination with SCHAC and the EEOC against DAK, alleging, in part, race discrimination and retaliation ("DAK Charge #1"). (Minus Dep. at pp. 49-50 and Dep. Exh. 15). Plaintiff's allegations of discrimination and retaliation were based on his 2001

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[2] Before he was employed by DAK, Plaintiff filed two separate charges of discrimination with SCHAC/EEOC against his former employer, DuPont. The first charge, 146990345, filed in March 1999, alleged race and age discrimination ("DuPont Charge #1"). (Minus Dep. Exh. 1). The second charge, 13CA00449, filed in February 2000, alleged race discrimination, age discrimination and retaliation ("DuPont Charge #2"). (Minus Dep. Exh. 3). The EEOC issued a Dismissal and Notice of Rights for both charges. (Minus Dep. Exhs. 2, 4). Plaintiff filed an unsuccessful lawsuit against DuPont on the basis of DuPont Charge #2. (Minus Dep. at pp. 24-26).

Performance Evaluation and his non-selection for a Customer Service Representative position at DAK. (Minus Dep. Exh. 15). On July 2, 2003, SCHAC issued a Dismissal and Notice of Rights, finding "no cause" as to Plaintiff's claims. (Minus Dep. Exh. 16). Subsequently, on September 22, 2003, the EEOC issued its Dismissal and Notice of Rights, affirming SCHAC's findings. (Minus Dep. Exh. 17).

In 2003, DAK again conducted performance evaluations of all its employees, including plaintiff, evaluating their performance in 2002. (Minus Dep. at p. 65). In this 2002 Performance Evaluation, plaintiff was rated "needs improvement" in five (5) out of eight (8) categories, including quality of work, initiative and energy, problem solving, dependability and commitment, and teamwork and interaction skills. (Minus Dep. Exh. 20). Again, plaintiff's overall performance was rated "below expectation." (Minus Dep. at p. 67 and Dep. Exh. 20). Although plaintiff disagreed with the 2002 Performance Evaluation, he neither filed an internal grievance with DAK nor a SCHAC/EEOC charge. (Minus Dep. at pp. 66-67).

In September 2002, due to the implementation of a new software program and the expansion of some of DAK's product lines, DAK needed individuals to fill three Customer Service Representative ("CSR") positions in Wilmington, North Carolina. Among other things, these CSRs are responsible for facilitating communication between DAK's sales department and its customers, as well as scheduling and planning customers' production needs. (Id. para. 19). DAK does not have a policy or practice of considering employees at one facility for open positions at another facility. *Id.*

In fact, with the exception of Director of Operations Matt Warrick, DAK has never transferred or promoted employees between its Wilmington and Cooper River facilities. *Id.*

After reviewing the resumes of the individuals who expressed an interest in the CSR positions, DAK chose three individuals, Brenda Owens, Pamela Johnson and Sherry Cowan, all of whom had significant past experience in customer service positions. *Id.* para. 21. Both Owens and Johnson had previously worked for DuPont in substantially similar customer service roles; Owens had worked for DuPont for twenty-nine (29) years and Johnson had worked for DuPont for twenty-five (25) years. *Id.* Similarly, prior to her employment with DAK, Cowan had worked for over ten (10) years in various customer service roles. *Id.* para. 22. Moreover, prior to accepting the permanent CSR positions, Owens, Johnson and Cowan had been working as temporary employees at DAK's Wilmington facility, where they assisted in CSR roles. *Id.* para. 23.

On June 9, 2003, DAK's corporate Human Resources ("HR") Department sent an e-mail to all DAK employees attaching links to the following four new employment policies: (1) Code of Business Conduct and Ethics Policy, (2) Confidentiality and Intellectual Property Agreement, (3) Electronic Communications Policy, and (4) Unlawful Harassment Policy. (Minus Dep. at pp. 69-71 and Dep. Exh. 21). As a condition of continued employment, all DAK employees were required to read the policies carefully, print two copies of each, sign each copy, return one signed copy to their site HR representative, and keep one sign copy for their personal files. *Id.* Employees were expressly advised that if they had any questions regarding

the policies, they should contact their site HR representative. *Id.* Plaintiff received this e-mail. (Minus Dep. at p. 69).

Due to the failure of some employees, including plaintiff, to comply with the June 9th e-mail, on June 23, 2003, Amber Tobin, a DAK HR Specialist, sent another e-mail to all DAK employees reminding them that they were required to read, sign and return the policies by no later than June 30, 2003. (Minus Dep. at p. 73 and Dep. Exh. 22). Plaintiff received this e-mail and read all of the policies, but he did not sign and return them by June 30, 2003, or any later date. (Minus Dep. at pp. 73-75). On June 29, 2003, Greg Southerland, plaintiff's supervisor, gave plaintiff hard copies of the four policies, asked him to sign them and advised plaintiff that any questions should be referred to DAK's site HR representative, Tobin. (Minus Dep. at p. 78 and Dep. Exh. 23). The following day, June 30, 2003, plaintiff submitted a letter to DAK's corporate HR Manager requesting additional time to have his attorney review the policies. (Minus Dep. Exh. 23). Plaintiff does not recall if he made any efforts to consult with an attorney or ask questions of any DAK HR representative between his initial receipt of the policies on June 9th and the June 30, 2003, deadline for their return. (Minus Dep. at pp. 82-83).

By July 15, 2003, more than five weeks after the policies were initially sent to plaintiff, he still had not signed and returned them to DAK. *Id.* at pp. 91-92. Plaintiff does not recall whether he called any attorneys between June 30th and July 15, 2003, in an effort to get his questions answered. *Id.* at p. 97. In any event, on July 15, 2003, Ron Warnock, DAK's HR Manager for the Charleston facility, and Southerland met with plaintiff to discuss the situation. (*Id.* at pp. 92-93). During that meet-

ing, Warnock emphasized to plaintiff that signing the policies was a condition of continued employment at DAK. *Id.* at p. 93). Warnock informed plaintiff that at that time plaintiff was the only DAK employee at the facility who had not complied with this requirement, and plaintiff is not aware of any other employee at DAK's Cooper River facility who did not sign and return the policies by July 15, 2003. (Minus Dep. at p. 93; Warnock Aff. para. 26). Warnock and Southerland answered questions for plaintiff and then gave him time to review the documents in private. (Minus Dep. at pp. 94-96). While Warnock and Southerland were out of the conference room, plaintiff re-read the policies. *Id.* at p. 95. After Warnock and Southerland returned to the conference room, and on more than one occasion during the July 15, 2003 meeting, Warnock asked plaintiff to reconsider his decision not to sign the policies. *Id.* at p. 96. Warnock told plaintiff he would recommend the termination of plaintiff's employment if he did not sign the forms. *Id.* Plaintiff still refused to sign the policies; Warnock escorted plaintiff from the facility and informed him that he was recommending termination effective July 15, 2003. (Minus Dep. at pp. 98-99 and Dep. Exh. 25).

On July 31, 2003, plaintiff participated in a DAK Personnel Case Review ("PCR") meeting to review his termination. (Minus Dep. at p. 103 and Dep. Exh. 27). At no time during the PCR meeting did plaintiff offer to sign the policies, and he cannot recall any mention of his EEOC charges during the meeting. (Minus Dep. at p. 110). At the conclusion of the PCR meeting, Warnock and Southerland informed plaintiff that he was no longer employed by DAK. *Id.* at pp. 109-10.

After the PCR meeting, on September 29, 2003, plaintiff filed a second SCHAC/EEOC charge against DAK, alleging race discrimination and retaliation based on his termination from employment (DAK Charge #2). (Minus Dep. at pp. 116-17 and Dep. Exh. 28). On December 17, 2003, the EEOC issued its Dismissal and Notice of Rights, finding "no cause" concerning plaintiff's claims. (Minus Dep. Exh. 30).

TITLE VII LAW

In his Title VII charges (DAK Charges #1 and #2), plaintiff alleged that the following employment actions by DAK were motivated by race and retaliation: (1) his negative 2001 Performance Evaluation conducted in June 2002; (2) his non-selection for a Customer Service Representative position in September 2002; and (3) his termination from employment in July 2003. (Minus Dep. at pp. 50, 118 and Dep. Exhs. 15 and 28).

To prevail on his discrimination claim, plaintiff must prove by a preponderance of the evidence that "but for" the employer's motive to discriminate against him because of his race or protected activity, the adverse employment actions about which he complains would not have occurred. *See, Henson v. Liggett Group, Inc.*, 61 F.3d 270, 274 (4th Cir. 1995); *EEOC v. Clay Printing Co.*, 955 F.2d 936, 940 (4th Cir. 1992).

Under Title VII, a plaintiff has two alternative avenues of proof to meet this burden: (1) a "pretext" framework judicially created for use in federal discrimination cases; or (2) a "mixed-motive" framework. *E.E.O.C. v. Warfield-Rohr Casket Co., Inc.*, 364 F.3d 160, 163 (4th Cir. 2004). Here the only avenue of proof is the "pretext" framework.

The United States Supreme Court first articulated the familiar burden shifting proof scheme for analyzing cases of employment discrimination in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). First, plaintiff must prove, by a preponderance of evidence, a *prima facie* case of race discrimination. To establish a *prima facie* case of discrimination under Title VII, a plaintiff must prove that: (1) he is a member of a protected class; (2) he suffered an adverse employment action; (3) at the time of the action, he was performing at a level that met his employer's legitimate job expectations; and (4) his position remained open or was filled by a similarly qualified applicant outside the protected class. *See, e.g., Murray v. United Food & Commercial Workers Union*, 100 Fed. Appx. 165, 171-72. 2004 WL 1254979 (4th Cir. 2004) (citing *Reeves v. Sanderson Plumbing, Inc.*, 530 U.S. 133, 142 (2000)); *Love-Lane v. Martin*, 355 F.3d 766, 787 (4th Cir. 2004).

To establish a *prima facie* case of retaliation under Title VII, a plaintiff must prove the following by a preponderance of the evidence: (1) that he engaged in protected activity; (2) that the employer took adverse employment action against him; and (3) that a causal connection existed between the protected activity and the adverse action. *Honor v. Booz-Allen & Hamilton, Inc.*, 383 F.3d 180 (4th Cir. 2004).

If this burden is met, a rebuttable presumption of discrimination then arises and the burden of production shifts to the defendant to articulate a legitimate, nondiscriminatory reason for the challenged employment decision. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 506-08 (1993); *Hill v. Lockheed Martin Logistics Mgmt., Inc.*, 354 F.3d 277, 285 (4th Cir. 2004).

Once the defendant meets its burden of production, the presumption created by the *prima facie* case "drops out of the picture", and the burden shifts back to plaintiff to prove by a preponderance of the evidence that DAK's asserted reasons for the challenged employment actions were pretextual, that is, not the true reasons for the employment decisions, and that the true reason was intentional discrimination by the employer on the basis of Plaintiff's race and retaliation. *St. Mary's*, 509 U.S. at 510-11, 515-17; *Hill*, 354 F.3d at 285. At this point, the burden to demonstrate pretext "merges with the ultimate burden of persuading the court that [the plaintiff] has been the victim of intentional discrimination." *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 256, 101 S.Ct. 1089 (1974).

DISCUSSION

A review of the record and relevant case law reveals that the defendant's motion should be granted.

For purposes of its summary judgment motion, DAK assumes that plaintiff can establish the elements of his *prima facie* case of discrimination, thus shifting the burden of production to DAK to articulate a legitimate, nondiscriminatory reason for each of the adverse employment decisions about which plaintiff complains. The defendant's argument is that the plaintiff has only his own conclusory belief that DAK's proffered reasons for its action are just pretext for the real reason, illegal discrimination. Therefore, the defendant is entitled to judgment as a matter of law.

a. 2001 Performance Evaluation

When DAK implemented a new performance evaluation system in the spring of 2002, all DAK employees, including plaintiff, were informed that since it was a new system, the results of the first performance evaluations would have no bearing on employees' variable compensation for the prior year. Rather, the evaluations would be used as a benchmark for how performance would be judged by DAK in the future. Plaintiff's 2001 Performance Evaluation indicated that he needed to improve his work performance in four (4) out of eight (8) categories, and he received an overall evaluation of "below expectations." Plaintiff disagreed with this evaluation and pursued an internal grievance alleging retaliation. DAK investigated and concluded that plaintiff's 2001 Performance Evaluation was based solely on his performance, and there was no validity to his retaliation allegations. White employees who never filed charges of discrimination also received an overall rating of "below expectations" in their 2001 performance evaluations.

Plaintiff claims his 2001 Performance Evaluation[3] was motivated by race and retaliation discrimination because: (1) he believes his performance was good; and (2) his attendance rating within the evaluation was lower than two white employees who Plaintiff alleges had more absences than he did. (Minus Dep. at pp. 57, 51). However, the case law makes clear that a plaintiff's unsubstantiated beliefs about his performance are

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[3] It also appears that the plaintiff did not suffer an actionable adverse employment action since the review did not result in an adverse effect on the terms, conditions, or benefits of his employment. See, e.g., *Von Gunten v. Maryland*, 243 F.3d 858, 865-68 (4th Cir. 2001).

insufficient to establish discrimination. *See, Evans v. Technologies Applications & Serv. Co.*, 80 F.3d 954, 960 (4th Cir. 1996) (finding that the plaintiff's unsubstantiated allegations and bald assertions concerning her own qualifications and the shortcoming of her co-workers failed to disprove the employer's explanation for its decision or to show discrimination); *see also, Goldberg v. B. Green & Co.*, 836 F.2d 845, 848 (4th Cir. 1988) (noting that plaintiffs "own naked opinion, without more, is not enough to establish discrimination"). Moreover, although plaintiff may disagree with DAK's evaluation of his performance, that disagreement alone does not render DAK's business decision illegitimate or untrue. *See, Beau v. Abbott Labs,* 130 F.3d 614, 620 (4th Cir. 1997) (courts leave to employer's discretion the method of evauating an employee's job performance); *see also, Smith v. Flax,* 618 F.2d 1062, 1067 (4th Cir. 1980) (stating that "it is the perception of the decision maker which is relevant," not the self assessment of the plaintiff).

Next, as far as the plaintiff's contention that two white employees were absent from work more than he was, he deposed that he did not know why they were absent, or whether those absences were protected by the Family and Medical Leave Act. (Minus Dep. at pp. 52-53). Moreover, he has never seen either employee's personnel file, *Id.* at 115-16, so he has no credible basis for comparing their 2001 Performance Evaluations to his. His claim fails since he has not forecast evidence that DAK's legitimate, nondiscriminatory reasons for his 2001 Performance Evaluation were a pretext for intentional discrimination. *See, e.g., Weeks v. Union Camp Corp.*, 215 F.3d 1323 (4th Cir. 2000) (affirming summary judgment for the employer on plaintiffs Title VII claim

where plaintiff failed to show that his conduct was comparable to other employees who were treated differently).

b. September 2002 CSR positions

In September 2002, DAK needed individuals to fill three CSR positions in North Carolina.

Plaintiff neither applied for the position nor informed anyone at DAK of his interest in the positions. (Warnock Aff. para. 24). After reviewing the resumes of the individuals who did express an interest in the CSR positions, DAK chose three individuals all of whom had significant past experience in customer service positions and who had assisting in CSR roles.

Plaintiff has no evidence whatsoever to support his claim that his non-selection for a CSR position was motivated by race or retaliation. First, DAK had no knowledge that plaintiff was even interested in a CSR position; Plaintiff neither applied for the position nor informed anyone at DAK of his interest. Absent such knowledge by DAK, plaintiff's failure to be selected cannot be the result of intentional discrimination.

Second, even if plaintiff had applied, he cannot show that he was better qualified than the candidates who were selected. *See, Evans v. Technologies Applications & Serv. Co.*, 80 F.3d 954, 960 (4th Cir. 1996) (noting that in discrimination claim based on failure to promote, plaintiff must establish that he was better qualified candidate for position sought). Plaintiff admitted that he knew nothing about the work history, experience or qualifications of the candidates selected. (Minus Dep. at p. 55). In light of DAK's uncontroverted evidence of the selectees' relative qualifications, plaintiff's claim fails as a matter of law.

c. July 2003 termination

DAK has presented evidence that the reason it terminated plaintiff's employment was because the plaintiff refused to sign and return company policies, despite ample time for review and questioning. Plaintiff was clearly apprised of and understood the consequences of his failure to sign the policies, and he was given numerous opportunities to ask questions, obtain information and reconsider his position. Moreover, he was aware that he was the sole employee at the plant who did not sign the policies when he was fired.

Here, it appears that DAK has demonstrated that its decisions regarding plaintiff's employment were based on legitimate, nondiscriminatory factors unrelated to race or retaliation and that the plaintiff has presented nothing but his wholly insufficient beliefs in rebuttal. There is no dispute that plaintiff refused to sign and return various company policies and that his employment was terminated because of that refusal. There is also no dispute that by the time Plaintiff was fired he was the only employee who did not sign and return the policies. Moreover, plaintiff was fully aware that signing and returning the policies was a condition of continued employment at DAK. Although plaintiff may disagree with this requirement, his disagreement alone, absent any suggestion of unequal treatment, does not render DAK's termination decision illegitimate or untrue.

CONCLUSION

Accordingly, for the aforementioned reasons, it appears there is no genuine issue of material fact sufficient to withstand summary judgment. Therefore it is recommended that the defendant's motion for summary judgment be granted, all other motions be deemed moot, and this matter ended.

Respectfully Submitted,

/s/ Robert S. Carr
Robert S. Carr
United States Magistrate Judge

Charleston, South Carolina

December 28, 2004